NO. 82-294

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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

STATE OF LOUISIANA,

Petitioner

versus

JOSEPH MARSHELL,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF
LOUISIANA

JOHN H. CRAFT,
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QUESTION PRESENTED

WHETHER THE TRIAL COURT'S SEVERENCE OF DEFENDANTS' TRIALS WAS SUFFICIENT TO AVOID CONFLICT OF INTEREST AND PREJUDICE TO DEFENDANT WHO WAS REPRESENTED, JOINTLY, WITH CO-DEFENDANT BY ONE LAWYER.

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OPINIONS BELOW

The majority opinion, as well as the three dissenting opinions, of the Louisiana Supreme Court under case No. 81–K–0426, are set out in the Appendix to this petition.

JURISDICTION

The judgment of the Louisiana Supreme Court, reversing the conviction of Joseph Marshell was rendered on May 17, 1982. The State of Louisiana filed for an Application for Rehearing, which was denied, summarily, by the court on June 18, 1982. Thereafter the State of Louisiana requested a Stay of Mandate from the Louisiana Supreme Court, in order to present this petition to this Court, which was granted, giving the State of Louisiana sixty days from the granting of the stay, June 22, 1982, to file this petition.

It is under this Honorable Court's appellate jurisdiction of State Supreme Court decisions concerning an interpretation of this Honorable Court's opinion that the State of Louisiana now comes. (U.S. Const. ARt. 3 §2.)

STATEMENT OF THE CASE

Joseph Marshell, respondent herein, and Kevin Marshell (no relation) were jointly indicted by the Orleans Parish Grand Jury for the March 23, 1980 murder of Max Minnig, a visitor to the city, who was shot to death during a robbery. Both Joseph and Kevin Marshell were indigent and the trial court appointed John Lawrence, Esq., a member of the Orleans Parish Indigent Defender Program, to represent both defendants. Among his pretrial motions, Mr. Lawrence filed a Motion to Appoint Separate Counsel and a Motion for a Severence of the cases for trial. Although there was no formal hearing held and transcribed, the trial court denied the motion for the appointment of separate counsel, but he granted the motion for a severence of the cases for trial.

Joseph Marshell was tried first; he was convicted of first degree murder and sentenced to death. Kevin Marshell later pled guilty to manslaughter and was sentenced to twenty-one years imprisonment. During the course of the testimony at Joseph Marshell's trial it was established that he was the triggerman, and that Kevin, the lookout, grabbed a piece of property from one of the victims.

On appeal to the Louisiana Supreme Court, Joseph Marshell raised twenty-three assignments of error, including a complaint about the trial court's failure to appoint separate counsel for each defendant. On May 17, 1982, the Louisiana Supreme Court reversed the defendant's conviction based on this complaint (see *Marshell*, 81–KA–0426, in appendix), relying on two cases from this Honorable Court, *Holloway*

v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L.Ed.2d 426 (1978) and *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980). The State of Louisiana respectfully disagreed with the Louisiana Supreme Court's decision and applied for a rehearing of the case, which was denied on June 18, 1982. The State of Louisiana filed a motion for a stay of mandate in this case in order to apply to this Honorable Court for a review of the State Court's decision. On June 21, 1982, the Louisiana Supreme Court granted the State sixty days in which to file its Application for a Writ of Certiorari in this Court. (See Motion for Stay of Proceedings in Appendix.) It is from the above proceedings and adverse rulings that the State now petitions this Honorable Court for a Writ of Certiorari.

ARGUMENT

This case involves a claim by the respondent that his Sixth Amendment right to effective representation of counsel was impermissibly infringed upon by the trial court's denial of a motion to appoint separate counsel for the respondent and a co-defendant. The respondent, Joseph Marshell and his co-defendant, Kevin Marshell, were both represented by a single attorney, Mr. John Lawrence from the Orleans Parish Indigent Defender Program. Mr. Lawrence made two pretrial motions, among others, asking the court to sever the cases for trial; also, he asked the court to appoint a separate attorney for each defendant. The trial court denied the motion for separate counsel, but it granted the Motion for Severence. Joseph Marshell was tried first and convicted of murder. On appeal, the Louisiana Supreme Court reversed respondent's conviction, based on its decision that the trial court should have granted respondent's motion for separate counsel. In his written dissenting opinion - - which was one of three written dissents in this four to three decision - - Associate Justice Walter Marcus notes, "the instant case involves a defendant who raised the issue of a conflict

of interest prior to trial - - as in Holloway - - but who received a separate trial - - as in Sullivan. Thus, neither case is directly on point." (*State v. Marshell*, 81–KA–0426, Marcus, J., May 17, 1982). The majority opinion, written by Associate Justice Fred Blanche, Jr., held that because the respondent made a pretrial motion for appointment of separate counsel, it must reverse the conviction based on his interpretation of *Holloway v. Arkansas*. Petitioner submits that because the trial court severed respondent's case from his co-defendant's case, the *Cuyler v. Sullivan* decision should control this case rather than the *Holloway* decision. The dissent, in Marshell is correct in its evaluation that, "When jointly represented defendants are tried separately, it is more logical for a reviewing court to apply *Sullivan's* requirement that defendant demonstrate an adverse effect on counsel's ability to perform than to predicate the decision on a distinction between *Sullivan* and *Holloway* based on whether defendant raises the allegation before or after trial." (*State v. Marshell*, supra, Lemmon, J., dissenting.)

In the *Holloway* decision this Honorable Court said:

> "One principle applicable here emerges from *Glasser* without ambiguity. Requiring or permitting a single attorney to represent co-defendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Holloway v. Arkansas*, 435 U.S. 483, 98 S. Ct. 1178.

In reversing the conviction in *Holloway* this Court held that "the judge then failed either to appoint separate counsel *or to take adequate steps* to ascertain whether the risk was too remote to warrant separate counsel." *Holloway v. Arkansas*, supra (footnote omitted). In the present case respondent's attorney made a pretrial motion for appoint-

ment of separate counsel. While the trial court did not grant that motion, it did take adequate steps to dismiss the risk of a potential conflict of interests by severing the two defendants' cases for trial. By doing so, petitioner submits that the trial court substantially complied with the requirements set out by this Court in *Holloway*. Also, once the trial court severed the two defendant's cases the issue of joint representation becomes much more similar to the facts and principles in *Cuyler v. Sullivan* than to the *Holloway* case. In *Cuyler v. Sullivan*, there were three defendants all represented by two attorneys. In three separate trials, one defendant was convicted and the other two were acquitted. This Honorable Court indicated that, "The provision of separate trials for Sullivan and his co-defendant's *significantly reduced* the potential for a difergence in their interests." *Cuyler v. Sullivan*, 100 S. Ct. 1708, 1718. (Emphasis added). In the present case the respondent was tried separately from his co-defendant and although his counsel did make a pretrial motion for appointment of separate counsel, he never did present the court with any assertions of actual conflict of interest or prejudice that would result from joint representation.

This Court, in *Cuyler v. Sullivan*, required such a showing before it would reverse a conviction based on a claim of denial of effective counsel due to joint representation. Because the respondent was in a similar position to the defendant in *Cuyler v. Sullivan* by being tried separately from his co-defendant, he should also be required to demonstrate actual conflict of interest and prejudice from joint representation before his conviction would be reversed.

The Louisiana Supreme Court based its decision in the present case, exclusively, on the point when the respondent raised the complaint of joint representation. In the present case, as in *Holloway*, the issue was raised pretrial; but, in *Cuyler*, the defendant did not raise the complaint until after

he was convicted. Petitioner submits that this distinction is not the only one that can validly be made in these cases.

When the trial court takes a substantial step to avoid any risk of conflict between two defendants by severing the cases for trial - - as it did in the present case - - then before the defendant can succeed in asserting that his constitutional right to counsel was violated, he must show some actual conflict of interest and prejudice. The majority of the Louisiana Supreme Court did not use this analysis to reach its decision in this case, although that is the reasoning set out in the dissenting opinions.

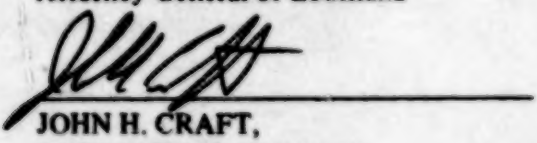
Petitioner submits this is the correct reasoning that should have been applied to the present case, and when so applied respondent's conviction would have been affirmed because he failed to show any actual conflict of interest or prejudice from the joint representation at separate trials.

CONCLUSION

The State of Louisiana respectfully prays that a Writ of Certiorari issue from this Honorable Court directed to the Louisiana Supreme Court, ordering that the judgment of that court, reversing Joseph Marshell's conviction, be set aside and his conviction affirmed.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,
Attorney General of Louisiana



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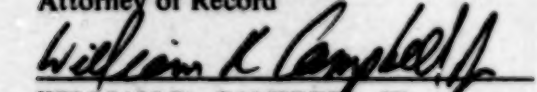

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CERTIFICATE OF SERVICE

I certify that a copy of this Petition For Writ of Certiorari To The Supreme Court of Louisiana has been sent to

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